Supreme Court, U.S.
FILED
JUL 22 1996
OFFICE OF THE CLERK

Docket No. 96 179

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1995

Great Western Bank, a Federal Savings Bank,
Petitioner,

v.

Elaine Kapsimalis, an unmarried woman, and
the Estate of Elaine Kapsimalis,
Respondents.

On Petition for Writ of Certiorari to the
Court of Appeals for the State of Arizona

PETITION FOR WRIT OF CERTIORARI

Roger R. Foote, Esq.
Counsel of Record
1201 South Alma School Road
Suite 12000
Mesa, Arizona 85210-2015
Telephone: (602) 464-1111

Roger R. Foote, Esq.
Eric M. Jackson, Esq.
Roger C. Decker, Esq.
Counsel for Petitioner
1201 South Alma School Road
Suite 12000
Mesa, Arizona 85210-2015
Telephone: (602) 464-1111

QUESTIONS PRESENTED

I. Whether a State Appeals Court can overturn the determination of a Bankruptcy Court that there was nothing under federal law that prohibited a trustee's sale of the debtor's residence.

II. Whether a debtor-in-possession from a Chapter 11 bankruptcy case can appeal a trial court judgment after the case has been converted to a Chapter 7 case.

LIST OF CORPORATE AFFILIATES

The parent company of Great Western Bank, a Federal Savings bank, is Great Western Financial Corporation, a Delaware corporation. All parties appear in the caption.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i
LIST OF CORPORATE AFFILIATES ii
TABLE OF CONTENTS ii
TABLE OF AUTHORITIES iv

CITATIONS TO OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THE CASE 1

STATEMENT OF JURISDICTION 1

CONSTITUTIONAL PROVISION, TREATIES STATUTES, ORDINANCES, REGULATIONS INVOLVED IN THE CASE 2

STATEMENT OF THE CASE 2
I. Facts Material to Consideration of Question Presented 2
II. Proceedings Below 6

REASONS FOR GRANTING THE PETITION 10
I. The Bankruptcy Judge's Orders Must Be Given Effect. 10
II. The Proper Court To Decide The Issue Decided By The Arizona Court Of Appeals Was The Bankruptcy Court. 12
III. The Arizona Appellate Court Decision Conflicts With Federal Bankruptcy Law. 14
IV. The Arizona Appellate Court Decision Is Contrary To The Parties' Intent 21
V. Kapsimalis Could Not Appeal The Judgment 26
VI. The Question Presented Is Important 27

CONCLUSION 30

APPENDIX A (Court of Appeals Decision) A-1
APPENDIX B (Trial Court Decision) A-6
APPENDIX C (Judgment) A-8
APPENDIX D (1993 Bankruptcy Court Order) A-11
APPENDIX E (Bankruptcy Plan) A-14
APPENDIX F (Denial of Reconsideration) A-21
APPENDIX G (Denial of Review) A-22
APPENDIX H (Text of Relevant Provisions) A-23

TABLE OF AUTHORITIES

Cases — Page

In re Adelstein, 167 B.R. 589 (Bankr. D. Ariz. 1994) 18

Arizona v. California, 460 U.S. 606 (1983) 10

Averett v. Farmers Insurance Company of Arizona, 177 Ariz. 531, 869 P.2d 505 (1994) 23

In re Canal Place Limited Partnership, 921 F.2d 596 (5th Cir. 1991) 15

Carlock v. Pillsbury Co., 719 F.Supp. 791 (D. Minn. 1989) 26

Danar Associates v. Porter, 43 B.R. 423 (D.Conn. 1984) 26

In re Doty, 129 B.R. 571 (Bankr. N.D. Ind. 1991) 18, 23

Fox v. Weissbach, 76 Ariz. 91, 259 P.2d 258 (1953) 25

In re Goodman, 809 F.2d 228 (4th Cir. 1987) 13

Heck v. Humphrey, 114 S.Ct. 2364 (1994) 11

In re Herrera, 23 B.R. 796 (9th Cir. BAP 1982) 19

Hester v. Farmers Home Administration, 49 B.R. 593 (Bankr. E.D. Mo. 1985) 26

Hillis Motors, Inc. v. Hawaiian Auto Dealers' Association, 997 F.2d 581 (9th Cir. 1993). . 15, 16, 18, 20, 21

Isaak v. Massachusetts Indemnity Life Insurance Company, 127 Ariz. 581, 623 P.2d 11 (1981) 22

In re Johns-Mansville Corp., 97 B.R. 174 (Bankr. S.D. N.Y. 1989) 13

In re Lafayette Dial, Inc., 92 B.R. 798, 801 (Bankr. N.D. Ind. 1980) 12, 19

Lair v. Olgesby, 14 F.3d 15, 17 (8th Cir. 1993) 11

In re Leird Church Furniture Manufacturing, Co., 61 B.R. 444 (Bankr. E.D. Arkansas 1986) 26

In re Little, 91 B.R. 451 (Bankr. S.D. Ohio 1988) 18

In re Mako, Inc., 120 B.R. 203 (Bankr. E.D. Okla. 1990) 23

In re Mann, 907 F.2d 923 (9th Cir. 1990) 12

May v. Le Claire, 11 Wall. 217 (1870) 12, 22

McMillan v. MBank, Fort Worth, N.A., 4 F.3d 362 (5th Cir. 1993) 27

In re Moussa, 93 B.R. 96 (Bankr. N.D. Tex. 1988) 17

In re MSG Marketing, 111 B.R. 264, (9th Cir. BAP 1990) 18

In re Ozark Restaurant Equipment Co., 816 F.2d 1222 (8th Cir. 1987) 26

In re Peters, 184 B.R. 799 (9th Cir. BAP 1995) 9, 19-22

Premier Resources Limited v. Northern Natural Gas Company, 616 F.2d 1171 (10th Cir. 1980) 23

In re Prime, Inc., 26 B.R. 556 (Bankr. W.D. Mo. 1983) 19

Prudence Realization Corp. v. Ferris, 323 U.S. 650 (1945) 23

In re Ranch House of Orange-Brevard, Inc., 773 F.2d 1166 (11th Cir. 1985) 13

In re R.I.&P Railroad Company, 72 F.2d 443 (7th Cir. 1934) 27

In re Springpark Associates, 623 F.2d 1377 (9th Cir. 1980) 18

Steele v. First National Bank in Wichita, 136 B.R. 278 (D. Kan. 1991) 17

In re Stratford of Texas, Inc., 635 F.2d 365 (5th Cir. 1981) 16

Taylor v. State Farm Mutual Auto Insurance Co., 175 Ariz. 148, 854 P.2d 1134 (1993) 23, 24

In re Texas General Petroleum Corp., 52 F.3d 1330 (5th Cir. 1995) 16

In re Texlon Corp., 596 F.2d 1092 (2nd Cir. 1979) 12

United Farm Bureau Mutual Insurance Co. v. Metropolitan Human Relations Commission, 24 F.3d 1008, 1013 (7th Cir. 1994) 11

United States v. ITT Continental Banking Co., 420 U.S. 223 (1975) 16

U.S. Through Farmers Home Administration v. Cook, 147 B.R. 513 (D. S.D. 1992). 17

United States v. United States Smelting-Refining & Mining Co., 339 U.S. 186 (1950) 10

Vreugdenhil v. Hoekstra, 773 F.2d 213 (8th Cir. 1985) ... 26

STATUTES AND RULES:

United States Constitution, Art.I, § 8, cl.4 27
11 U.S.C. § 362 ..... 3, 15, 27
11 U.S.C. § 704 26
11 U.S.C. § 1123 ..... 20, 21, 23
11 U.S.C. § 1127 13
11 U.S.C. § 1141 ..... 9, 11, 13, 14, 17, 28
11 U.S.C. § 1322 21
28 U.S.C. § 1257 1
Ariz.Rev.Stat.Ann. Section 33-810(B)(1994). 15

MISCELLANEOUS:

2 Collier on Bankruptcy, paragraph 362.08[5] (15th Edition 1995) 15
3 Corbin on Contracts, Section 572(B) (1992 Supp.) 23

IN THE SUPREME COURT OF THE UNITED STATES

October 1995 Term

Great Western Bank, a Federal Savings Bank, Petitioner

v.

Elaine Kapsimalis, an unmarried woman, Respondent

PETITION FOR WRIT OF CERTIORARI

Great Western Bank respectfully petitions for a writ of certiorari to review the judgment of the Arizona Court of Appeals in this case.

OPINIONS AND ORDERS

The opinion and order of the trial court (App., *infra*, B) are unreported. The opinion of the court of appeals (App., *infra*, A) is unreported. The order of the Supreme Court of the State of Arizona denying review (App., *infra*, G) is unreported.

JURISDICTION

The order of the Court of Appeals was entered on December 21, 1995 (App., *infra* A). The order denying a consideration was entered on January 25, 1996 (App. *infra* F). The order of the Supreme Court of the State of Arizona denying review was entered on April 23, 1996 (App., *infra*, G).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257. The Court of Appeals for the State of Arizona denied a right conferred on Petitioner by the United States Bankruptcy Court, District of Arizona and the Bankruptcy Code.

STATUTORY PROVISIONS INVOLVED

U.S. CONST., Art. I, § 8, cl.4; 11 U.S.C. § 362(d); 11 U.S.C. § 1123(a)(b)(d); 11 U.S.C. § 1127; and 11 U.S.C. § 1141; Ariz.Rev.Stat.Ann. § 33-810.

STATEMENT OF THE CASE

The Bankruptcy Court granted Petitioner relief from the automatic stay to allow foreclosure to proceed against Respondent, the debtor. The court later entered a second Stipulated Order which allowed Respondent to remain in the property; allowed Petitioner to foreclose without notice if Respondent failed to comply with the Order; and stated that the Bankruptcy Court "retain[ed] jurisdiction regarding [Petitioner's] lien." A Plan incorporating the Stipulated Order was confirmed.

After Respondent failed to comply with the payment provisions of the Bankruptcy Court's Order and confirmed Plan, Petitioner informed Respondent that the foreclosure on the property would be completed. The Bankruptcy Court denied Respondent's request to stop the foreclosure, stating that any defenses would have to arise under state law.

The state trial court found in favor of Petitioner. The Arizona Court of Appeals reversed the trial court judgment finding under federal law that the Plan extinguished the foreclosure right granted Petitioner by the Bankruptcy Court. In its decision, the Court of Appeals disregarded the Bankruptcy Court's determination, that Respondents' rights arose solely under state law. The Court of Appeals further misapplied federal law.

I. Facts Material to Consideration of Question Presented.

On or about May 25, 1988, Elaine Kapsimalis ("Kapsimalis") executed a Promissory Note (the "Note") and Deed of Trust with Great Western Bank ("Great Western"), as beneficiary, for the

sum of $499,950.00 (the "Loan"), on the property at 10191 East Jenan Drive, Scottsdale, Arizona ("the property"). The Deed of Trust was subsequently recorded on June 2, 1988, in Docket Number 88-266885, in the official records of Maricopa County, Arizona. Kapsimalis had financial difficulties and was unable to timely make payments due under the Note and Deed of Trust. In early 1991, Great Western, through CRC of Arizona as Trustee, commenced a trustee's sale to foreclose on the property.

On or about April 29, 1991, Kapsimalis filed bankruptcy, in Case Number 91-04780, in the United States Bankruptcy Court, District of Arizona. Great Western file a motion for relief from the automatic stay to complete the foreclosure. Kapsimalis negotiated a stipulation with Great Western where relief from the bankruptcy stay was obtained and the foreclosure was allowed to proceed if certain conditions were not met. The May 20, 1992 Stipulated Order of The Honorable George B. Nielsen, U.S. Bankruptcy Judge, Arizona ("Judge Nielsen") in the Bankruptcy Court, vacated all stays and injunctions, including the automatic stay under 11 U.S.C. § 362(a), with respect to the interest of Great Western. As part of the May 20, 1992 Bankruptcy Court Stipulated Order Great Western could not foreclose or conduct a trustee's sale if the Debtor paid certain proceeds to Great Western and otherwise "reinstated" the loan. The Stipulated Order further specified:

> It is further ordered that in the event of default in any term of **this** stipulation, that [Debtor] will have a ten (10) day grace period to cure said default, following written notice of default from Movant to Debtor by first class mail addressed to 10191 East Jenan Drive, Scottsdale, Arizona 85260. (Emphasis added)

Kapsimalis did not reinstate the loan and, based upon subsequent agreements, an additional Stipulated Order was entered in the Bankruptcy Court on April 26, 1993. The new Order, signed by Judge Nielsen: reaffirmed that the stay and injunctions were vacated **and annulled**; mandated monthly payments, commencing May 1, 1993; allowed a trustee's sale without further notice if the monthly payments were not paid within fifteen days; mandated curing all arrearages by April 1, 1994; mandated that the amended Plan and disclosure statement "shall contain current terms consistent with this Order"; and stated that the court "shall retain jurisdiction regarding the lien." (Appendix E).

On December 9, 1993, Kapsimalis' bankruptcy Plan was confirmed. The Plan incorporated the April 26, 1993 Order. Other than paying late, Kapsimalis generally complied with the **monthly** payment terms of the April 26, 1993 Order through April 1994. Kapsimalis did not pay the May 1, 1994 monthly payment. Kapsimalis did not attempt to cure the arrearages, or to reinstate on April 1, 1994. On April 22 or 24, 1994, after all sums due were calculated (including the April 20th payment), reinstatement figures were faxed to Steven B. Palmer, bankruptcy counsel for Kapsimalis, indicating $79,695.37 was needed to reinstate the Note and Deed of Trust and that such figures were good through April 30, 1994. Subsequently, on May 10, 1994, reinstatement figures were faxed to Bill Dancer, a prospective tenant who had been working with Kapsimalis, specifying slightly lower sums due and stating that the foreclosure sale, set for May 17, 1994, would be conducted absent reinstatement.

Although there is no evidence as to when Steven B. Palmer first became aware of the foreclosure sale, Kapsimalis was aware of the trustee's sale no later than May 10, 1994.

On May 12, 1994, Steven B. Palmer filed an application for Order to Show Cause with Judge Nielsen, requesting the postponement of the trustee's sale. The Order to Show Cause admitted that Great Western did not make any new agreement with Kapsimalis with respect to her arrearages. In the same pleading, the Debtor's counsel argued that Great Western breached its covenant of good faith and fair dealing and that the trustee's sale should not proceed. The Order to Show Cause also requested that Great Western be restrained from conducting the sale, claiming the notice was "stale" due to numerous continuances of the sale and requested "additional time to work with the debtor or her investors to negotiate a payment plan on the arrearages". Kapsimalis contended she had a prospective tenant, who was willing to put $20,000.00 down on a lease with an option to purchase, and that Kapsimalis had offered to pay the arrearage in quarterly payments. Finally, the Request for Order to Show Cause claimed that as foreclosures are equitable actions, the treatment by Great Western was inequitable and unfair. The Request for Order to Show Cause did not request that the Debtor be allowed to cure the arrearages. The request sought an order: 1) to compel Great Western's attendance at a settlement conference to negotiate a payment plan; 2) to postpone the trustee's sale to a time after settlement efforts had been concluded; 3) to vacate the portions of the April 26, 1993 and May 20, 1992 Orders relating to the stay lift; 4) to enter a *nunc pro tunc* Order with respect to the trustee's sale if the OSC was held after May 17, 1994; and 5) other miscellaneous relief. Judge Nielsen was advised of the request to enjoin the sale and denied such motion, stating that any trustee's sale defenses would have to arise **under State law** and would have to be asserted in State Court proceedings.

Thereafter, on May 17, 1994, the trustee's sale was conducted and the property sold to Great Western.

II. Proceedings Below.

On June 3, 1994, Great Western filed a Forcible Detainer Complaint in Maricopa County (Arizona) Superior Court (Cause No. CV 94-90943) against Kapsimalis and all occupants of the property. On June 8, 1994, Kapsimalis filed an Answer to the forcible detainer action and pled not guilty; the matter was set for trial in State Superior Court on June 23, 1994.

On June 20, 1994, Kapsimalis filed a Quiet Title Action against Great Western, Maricopa County Superior Court (No. CV 94-09396), filed a Lis Pendens, a Motion to Consolidate the Forcible Detainer with the Quiet Title Action and other motions. Also, on June 20, 1994, pursuant to Order of the Court, the parties filed a Joint Pre-Trial Statement. The stipulated issues with respect to the trustee's sale were whether Great Western "waived its right to conclude the May 17 trustee's sale", whether Great Western was "estopped from concluding the trustee's sale and whether the Bankruptcy Court Order of May 19, 1994 was *res judicata* as to the necessity of notice to Kapsimalis." On June 22, 1994, the Court entered an Order consolidating the cases and mandating the times for motions, responses and a reply. On July 12, 1994, Great Western filed an Answer to the Quiet Title Action, which included the defenses of failure to state a claim, waiver and *res judicata.*

Pursuant to the agreement of the parties and the Court's Order, on July 18, 1994, Great Western filed its Motion for Summary Judgment and accompanying Statement of Facts. On July 28, 1994, Kapsimalis filed her Response to Motion for Summary Judgment, with accompanying Statement of Facts and supporting Affidavit. In her Response, Kapsimalis alleged that: 1) Great Western had waived its ability to foreclose (as it had accepted

the late April 1, 1994 monthly payment); and 2) the foreclosure was "unconscionable"; arguing:

> The final Plan of reorganization of June 7, 1993 provides for the reaffirmation of the previous order dated May 20, 1992 which, as noted above, contains a ten day notice requirement.

Kapsimalis' prayer was "that the court find, as a matter of law, that GWB's exercise of the power of sale to be unconscionable conduct; to be **in violation of the bankruptcy orders previously issued by [the Bankruptcy] court**; and quieting title in Kapsimalis . . .".

On August 1, 1994, after reviewing the affidavits, documents and the arguments of attorneys, the Arizona trial court granted summary judgment in favor of Great Western and against Kapsimalis on the Quiet Title Complaint. The court also granted Great Western's Complaint on the forcible detainer, awarding fair market value rental of the property from May 1, 1994, until Kapsimalis vacated the property and, further, ordered that she remove the lis pendens before August 21, 1994. On September 8, 1994, a stipulated judgment was entered in the State Court action and the Lis Pendens released.

On September 22, 1994, the U.S. Bankruptcy Court (pursuant to Kapsimalis' motion) converted her Chapter 11 case to a Chapter 7 case.

On October 4, 1994, Kapsimalis, without the Chapter 7 Trustee, appealed the judgment of the Arizona Superior Court. In response to Great Western's motion to dismiss, the Appellate Court, on December 6, 1994, stayed the appeal and thereafter notified the Chapter 7 Trustee that it had until February 3 to

determine whether the automatic stay applied to the appeal, whether the appeal was part of Chapter 7 estate and whether the Trustee would request to be "substituted as the appellant". Subsequently, on February 6, 1995, counsel for the Trustee specified that the claim was property of the estate, and that the counsel for the Trustee was processing an application for appointment of David Talamante as special counsel. On February 8, 1995, the court acknowledged receipt of the items from counsel for the Trustee and directed that appellant's counsel "inform this court immediately if the Bankruptcy Court grants the application to permit him to represent the bankruptcy estate." Great Western then reurged its motion to lift the "stay" and request for a ruling on the motions, including dismissal, which were denied, even though there was no compliance with the February order which requires appellant's counsel to inform the court of the granting of the motion for David Talamante to represent the estate as special counsel.

On appeal, Kapsimalis raised six issues: 1) she claimed that "GWB could foreclose **without notifying** Kapsimalis only if they failed to make monthly installment payments and monthly arrearage payments" (emphasis added); 2) she claimed that there was a necessity for a "ten day written notice" for foreclosing under the lump sum provisions of the Plan, although the Plan did not expressly state this requirement; 3) she claimed that "the plan became internally conflictive when it reaffirmed the 1992 order and incorporated terms of the 1993 order."; 4) she claimed that, in viewing equitable considerations, it was necessary to give a ten day cure right and, again, argued that the foreclosure was unconscionable; 5) she argued the waiver by Great Western's acceptance of the April 1 monthly payment; and 6) that Kapsimalis was required to receive actual notice of the sale prior to the foreclosing.

On December 19, 1995, oral argument was held at the Arizona Court of Appeals. This is the first instance when the federal questions sought to be reviewed were raised. The questions were raised by the Appellate Court *sua sponte*. The Court of Appeals opined that the Plan was the controlling document, that the prior Order of the Bankruptcy Judge, even though it specifically stated the Plan would conform to such Order, could not override the congressional directive pursuant to 11 U.S.C. § 1141(d)(1).[1]

On December 21, 1995, the Arizona Court of Appeals held that since the Bankruptcy Court confirmed Kapsimalis' Plan of reorganization, that "only a default on a debt under the Plan can constitute a default after the Plan is confirmed. That is, a new default on a new obligation, and thus a creditor cannot rely on a continuation of a pre-bankruptcy sale on a pre-bankruptcy default to evade the statutory notice requirement." The Court of Appeals relied on ***In re Peters,*** 184 B.R. 799 (9th Cir. BAP 1995) for its decision. The Arizona Court of Appeals issued an order reversing the trial court's entry of summary judgment and remanded to the trial court for entry of judgment quieting title in favor of Kapsimalis.

Great Western's Motion for Reconsideration informed the Court of Appeals that it: 1) misapplied Federal Bankruptcy Court law, including the effect of a confirmed Plan in this case; 2) that the Orders of the Bankruptcy Court were binding with respect to the parties; 3) that the Court ignored the intent of the parties; 4) that the confirmed Plan expressly stated that the agreements and the rights of Great Western "have not been modified in any way"; 5) that the decision conflicted with the findings of the

---

1. At oral argument on appeal, one appellate judge questioned "How can a federal judge override that statute and say that the debt continues despite what Congress said in the Bankruptcy Code?"

Bankruptcy Court Judge; and 6) that there was additional evidence needed in order to support the holding of the Court of Appeals.

On January 25, 1996, the Court of Appeals on a two to one decision denied Great Western's Motion for Reconsideration, effectively dismissing the arguments of Great Western.

On April 23, 1996, the Supreme Court, State of Arizona, denied a petition for review.

REASONS FOR GRANTING THE PETITION

I. The Bankruptcy Judge's Orders Must Be Given Effect.

Just prior to the trustee's sale, Kapsimalis requested an Order to Show Cause hearing and requested the sale be enjoined for numerous reasons. Judge Nielsen, who had handled the case, including the stay relief, stipulated Orders and Plan confirmation, denied the Order to Show Cause. As to Kapsimalis' claim of "stale" notice because the sale had been continued for so long a time, the court stated that any such defenses would rise under state law. While this Order has some hint of *res judicata* and collateral estoppel, as there was no hearing, the question of whether there was a judgment on the merits may be suspect. However, clearly, the ruling by Judge Nielsen is the law of the case. Law of the case is an amorphous concept that is commonly defined as the doctrine "that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages of the same case." ***Arizona v. California,*** 460 U.S. 606, 618 (1983). This is, of course, a rule of practice that is based upon the sound policy that when an issue is once litigated and decided, that should be the end of the matter. ***United States v. United States Smelting-***

Refining & Mining Co., 339 U.S. 186 (1950). Matters that are precluded include those matters decided implicitly rather than explicitly. ***Lair v. Olgesby,*** 14 F.3d 15, 17 (8th Cir. 1993). While the case before the Arizona Court of Appeals was not the bankruptcy case, surely the doctrine of law of the case should be applied. It has been held that while the court's interpretation under federal statutes are not binding upon state courts, state courts should give careful consideration to prior federal rulings and such rulings are persuasive authorities. ***United Farm Bureau Mutual Insurance Co. v. Metropolitan Human Relations Commission,*** 24 F.3d 1008, 1013 (7th Cir. 1994).[2]

The Bankruptcy Court in this matter was fully aware of all bankruptcy law, of its previous Orders and the posture of the case at the time Kapsimalis brought her Order to Show Cause. The Bankruptcy Court clearly denied the relief sought, which included an injunction and specified that any relief would have to be under state law. Implicit in this finding is that there was no violation of bankruptcy law, there was no violation of the confirmed Plan and that the **only** recourse would be in state court regarding the question of "stale" notice because of the numerous continuations. The Arizona Court of Appeals did **not** decide the case under state law. Instead, it found that under 11 U.S.C. § 1141 the confirmation of the Plan changed the agreements between the parties. This is clearly irreconcilable with the Order denying the Order to Show Cause by the Bankruptcy Court and effectively overturns the Orders of the Bankruptcy Court. This is in clear conflict with the facts in this case, bankruptcy law; and numerous decisions of federal courts; It cannot be allowed to stand.

---

2. State courts are bound to apply federal rules and determine the preclusive effect of federal court decisions on issues of federal law. ***Heck v. Humphrey,*** 114 S.Ct. 2364, 2373 at N.9 (1994).

II. The Proper Court To Decide The Issue Decided By The Arizona Court Of Appeals Was The Bankruptcy Court.

After the confirmation of the Plan and after Kapsimalis failed to pay the lump sum that was due on April 1, 1994, Kapsimalis, through her bankruptcy attorney, filed an Application for an Order to Show Cause in the Bankruptcy Court, with the Judge who executed both the Stipulated Orders and confirmed the Plan. Kapsimalis did not claim that she could make the payment, that there was a violation of the confirmed Plan, or that they had not been given the ten days' notice, as claimed in the Superior Court case, but only that she needed more time to cure the arrearages. Clearly, the failure of the Debtor to explore the long range of effects of entering into stipulations is to be laid at the Debtor's feet; not at the feet of Great Western. *See, **In re Lafayette Dial, Inc.,*** 92 B.R. 798, 801 (Bankr. N.D. Ind. 1980). The courts are bound to uphold compromise agreements. ***May v. Le Claire***, 11 Wall. 217 (1870). The only allegation with respect to the notice issue, as brought by the Debtor in the bankruptcy case, was that it was "stale" notice because notice "was recorded many years ago and that the sale has been postponed well beyond a reasonable time." The Bankruptcy Court Judge refused to find any violation of bankruptcy law. If the decision of the Bankruptcy Court judge was incorrect with respect to **bankruptcy law**, the Debtor should have appealed or brought a special writ. *See, **In re Mann,*** 907 F.2d 923 (9th Cir. 1990). She did not.

If there was some mistake in the confirmed Plan, contrary to the understanding of the parties, that claim should have been brought to Judge Nielsen, who allowed a post petition trustee's sale for failure to pay the April 1 lump sum payment. Clearly, this is the appropriate and allowable procedure. *See, **In re Texlon Corp.,*** 596 F.2d 1092 (2nd Cir. 1979). Under 11 U.S.C.

§ 1127 the Kapsimalis Plan could be modified. Additionally, Article 5 of the Plan specified that "after confirmation the debtor may, with approval of the court, as long as it does not materially and adversely affect the interest of creditors, remedy a defect or omission, or reconcile any inconsistencies in the plan, or in the order of confirmation, as such manner as may be necessary to carry out the purpose and affect of this plan." If the Plan was in error, Kapsimalis could change the agreement; but **only** in the bankruptcy case.

Certainly, it is the Bankruptcy Court judge who has presided over the case from its inception who is in the best position to clarify any apparent inconsistencies in the rulings and/or the plan. ***In re Ranch House of Orange-Brevard, Inc.,*** 773 F.2d 1166 (11th Cir. 1985). Also, the Bankruptcy Court judge inherently has the ability, even without specific retention of jurisdiction, to rule on fundamental questions of interpretation and administration of the plan. *E.g.,* ***In re Johns-Mansville Corp.,*** 97 B.R. 174 (Bankr. S.D. N.Y. 1989).

If there was a violation of the Plan, it would affect the reorganization; it would have been the Bankruptcy Court judge's duty to take up the issue. *See,* ***In re Goodman,*** 809 F.2d 228 (4th Cir. 1987). The only claim in bankruptcy that was deferred to state court was that the notice was stale because it had been continued so many times. It was only after the denial of the Order to Show Cause and the trustee's sale that Kapsimalis claimed, in the quiet title action in Superior Court by Mr. Talamante, that the ten day claim was necessary.[3] Also, the ruling of the Arizona Court of Appeals, on the effect of 11 U.S.C. § 1141, is contrary to the Bankruptcy Court Order and the

---

3. Neither Mr. Talamante, nor Kapsimalis were directly involved in negotiations. However, Mr. Palmer, the Bankruptcy Court counsel, was.

parties' intent. Kapsimalis' claims are meritless under federal law, contrary to the orders of the Bankruptcy Court judge and the true understanding of the parties. Further, there has been no claim by Kapsimalis that, in fact, the parties believed the Plan confirmation required the trustee's sale to be re-noticed in the event was a post-confirmation default in the lump sum payment, but not in the monthly payment.

The Arizona Appellate Court has decided the case not on state law, but based upon federal bankruptcy law. The Debtor, in trying to stop the trustee's sale, had requested an Order to Show Cause in the Bankruptcy Court. Judge Nielsen inherently **declined to find any violation of any bankruptcy law** and stated that any claims would be solely based upon **state law**. The Arizona Appellate Court did not rule under state law; it ruled under bankruptcy law that a bankruptcy judge could not override Congressional intent, as stated in 11 U.S.C. § 1141. The ruling is contrary to the conclusion of the Judge who denied the Order to Show Cause, was involved in the negotiations in approving the Plan and the settlement agreements and, therefore, cannot be allowed to stand. The Bankruptcy Court was the only court which could and did decide the application of bankruptcy law.

III. The Arizona Appellate Court Decision Conflicts With Federal Bankruptcy Law.

The Arizona Court of Appeals concluded that, despite the prior history of the issues, the act of the confirmation of the Plan changed the agreements, unintentionally and contrary to the parties' own understanding. The Court of Appeals apparently believed, even though stay relief was granted, that since the confirmed Plan contained no **express** provision for a sale without further notice on the failure to cure the **lump sum arrearage**

payment, it was necessary to commence the trustee's sale anew, even though it was not necessary to commence a trustee's sale anew if there was a failure to pay under the **monthly provision**.

A critical issue in the Bankruptcy Court was whether stay relief was available to Great Western under 11 U.S.C. § 362. Clearly it was, as the parties **stipulated** to stay relief. The automatic stay plays a vital and fundamental role in bankruptcy and it insures that claims against the debtors will be brought through a single forum, the Bankruptcy Court. The stay protects the debtor by allowing it breathing space and also protects creditors. ***Hillis Motors, Inc. v. Hawaiian Auto Dealers' Association,*** 997 F.2d 581 (9th Cir. 1993). Once stay relief is granted, the creditor can foreclose on the property. *E.g.*, ***In re Canal Place Limited Partnership,*** 921 F.2d 596 (5th Cir. 1991). In this case, there was a stipulated Order for Relief in 1992. Agreements for relief from the automatic stay generally give the secured creditor certain rights if the debtor fails to perform. It is not uncommon to have arrangements involving a commitment to make a payment or payments and failure to do so allows the creditor to take whatever action he could outside of the bankruptcy case. *See,* **2 Collier on Bankruptcy,** paragraph 362.08[5] (15th Edition 1995). The 1992 agreement allowed Kapsimalis additional time to perform prior to Great Western exercising its contractual rights to foreclose under state law. As Kapsimalis had not been present at the prior sale date, there was no need for any notice of the sale that had been continued. ***Ariz.Rev.Stat.Ann. Section 33-810(B)(1994).*** The only notice necessary was contractual, as stated in the 1992 agreement. The agreement gave Kapsimalis a ten (10) day grace period **to cure**, after written notice; there was **no requirement to give any notice of the date of sale**. Even though Kapsimalis did not comply, a new agreement was made and incorporated into the 1993 Stipulated Order. The 1993 Stipulated Order did not

require **any notice prior to conducting the trustee's sale**; however, as to the monthly payments, it allowed Kapsimalis an additional fifteen (15) days from the due date to make such payment. If such payment was not made, the Order expressly states **"there is no need for further notice"** (Emphasis added). The 1993 Order stated that all arrearages "shall be paid by April 1, 1994" and did not specify that there was need for any notice to Kapsimalis prior to foreclosure. This is consistent with the rights already held by Great Western, as stay relief had been granted. Only a contractual obligation to forbear foreclosure, until April 1, 1994, remained to bar Great Western from foreclosure. The 1993 Order also stated that there had been **no modification** as to the terms and the rights of Great Western under the promissory note and deed of trust. Finally, the stipulated Order specified that the Plan shall be consistent with the Order and the agreement of the parties.

Apparently, the Arizona Court of Appeals believed that because there was a confirmed Plan subsequent to the Order, that the confirmed Plan unintentionally modified the agreements between the parties. However, this is in direct conflict with federal law. A confirmed Plan is essentially a consent decree and is construed as a contract. ***Hillis Motors, Inc.***, 997 F.2d at 588; ***In re Texas General Petroleum Corp.***, 52 F.3d 1330 (5th Cir. 1995) (a court applies the rules of contract interpretation to the interpretation of a plan of reorganization); ***In re Stratford of Texas, Inc.***, 635 F.2d 365 (5th Cir. 1981) (a confirmed "arrangement" is tantamount to a judgment of the Bankruptcy Court and it is like a contract subject to rules of construction and interpretation); *See*, ***United States v. ITT Continental Banking Co.***, 420 U.S. 223 (1975) (consent decrees and orders have many attributes of an ordinary contract and should be construed for enforcement purposes basically as a contract). Here, the intent of the parties is clearly expressed by the Stipulated Orders for

relief from the automatic stay. The agreements and the rights of Great Western have not been unintentionally modified by Plan confirmation. There are references in the Plan itself, to the stipulation and portions of the prior order. The consent decree in this case has previously been entered by the parties as expressed in the April 26, 1993 Order. This consent decree is to be used as the controlling document and the contract between the parties. In fact, the April 26, 1993 Order specifies that the Plan is to be consistent with the Order. The Plan in this case does not "cure" the default, clearly does not discharge the Debtor and does not create a new obligation which would require a new default. The stay relief has already allowed Great Western to foreclose. The Plan and the Order demonstrate that no rights have been modified, except as expressly set forth in the Plan and Order. Nowhere in the Plan or Order is there a mention of notice required to Kapsimalis in the event she does not pay the entire arrearages due as of April 1, 1994; nor is there any mention of the need to conduct a new trustee's sale or a requirement to re-notice the trustee's sale if Kapsimalis does not comply with such payment. The Appellate Court clearly misapplied federal bankruptcy law in this matter.

Further, it appears that the Court of Appeals had trouble believing a debtor's prior breach is not always cured on confirmation, because under 11 U.S.C. § 1141(d)(1)(A) "the confirmation discharges the debtor". However, again, this is clearly inconsistent with Bankruptcy Law. If there is an inconsistency between the general rules of bankruptcy and the Plan, the Plan's limitations are controlling and not those specified in the Bankruptcy Code or rules. *See,* ***In re Moussa,*** 93 B.R. 96 (Bankr. N.D. Tex. 1988); ***U.S. Through Farmers Home Administration v. Cook,*** 147 B.R. 513 (D. S.D. 1992). *See,* ***Steele v. First National Bank in Wichita,*** 136 B.R. 278 (D. Kan. 1991) (11 U.S.C. § 1141 contains exceptions which, if the

Plan or Order confirming the Plan provide otherwise, controls). The construction of the confirmed Plan is no different than construing a contract. ***Hillis Motors, Inc.,*** 997 F.2d at 588 (Although a confirmed plan is essentially a judgment rendered in a Federal Court, arising under federal law, the plan is interpreted according to State Contract Law); *Accord,* ***In re Doty,*** 129 B.R. 571 (Bankr. N.D. Ind. 1991) (principles of contract construction and parol evidence rule were applicable in construing order confirming debtor's amended Chapter 11 plan).

This action involves a forbearance provision and a drop dead clause in a settlement agreement, which the Bankruptcy Court mandated be included in the confirmed Plan. In authorizing a compromise, it is necessary for the Bankruptcy Court to review the settlement agreement and approve it only if it is fair and equitable. ***In re MSG Marketing,*** 111 B.R. 264 (9th Cir. BAP 1990). Once there is a compromise agreement, the parties cannot disown their agreement. ***In re Adelstein,*** 167 B.R. 589 (Bankr. D. Ariz. 1994); ***In re Little,*** 91 B.R. 451 (Bankr. S.D. Ohio 1988) (debtors were precluded from disavowing settlement agreement incorporated into plan that had been confirmed). What the Appeals Court has effectively done is to eviscerate the stipulated Order, based upon the erroneous contention that because there was a confirmed Plan there was a modification of the relationships between the parties. However, the Ninth Circuit has found on many occasions involving settlement agreements in a bankruptcy cases, that the settlement agreement is binding throughout that particular case and is even binding in subsequent bankruptcy cases. In ***In re Springpark Associates,*** 623 F.2d 1377 (9th Cir. 1980), the Ninth Circuit stated that, even in a subsequent bankruptcy, the stipulation will be enforced:

> The debtor here has a chance of avoiding liquidation, but chose instead to agree to an order setting a specific

time when the property could be sold, if refinancing could not be obtained. It is now bound by that settlement order. ***Id.*** at 1380.

Once having settled a dispute through the entry of an agreed order, the debtor is not permitted to change its mind and repudiate the agreement and, indeed, attempts to do so are frequently condemned in the strongest possible terms. *See*, ***In re Herrera,*** 23 B.R. 796, 797 (9th Cir. BAP 1982). Such orders are binding unless the debtor specifically seeks and obtains a modification of such orders. ***In re Prime, Inc.,*** 26 B.R. 556, 560 (Bankr. W.D. Mo. 1983); ***In re Lafayette Dial, Inc.,*** 92 B.R. at 801. The confirmation of the Kapsimalis Plan[4] cannot and does not **inadvertently** change the prior agreement or the positions of the parties.

The case of ***In re Peters*** (relied on by the Arizona Court of Appeals) does not suggest otherwise. In ***In re Peters,*** there was **no stay relief**, **no prior agreement** and **no orders** which were incorporated into the plan. In ***In re Peters,*** there was a trustee's sale scheduled; prior to the actual date of the sale, the debtor filed a Chapter 13 bankruptcy. The plan provided Mason could retain its lien and that the debtor would cure any arrearages under the plan. 184 B.R. at 801. The ***Peters*** plan also specifically stated "while in default at the time of filing for relief, this obligation **shall be reinstated by virtue of this plan** and shall not be deemed a modification of this creditor's rights." ***Id.*** The plan also provided that all property revested in the debtor and that the automatic stay would stay in effect until discharge. ***Id.*** The issue on appeal was whether the continuation of foreclosure sale, post confirmation, **violated the automatic**

---

4. The Plan subsequently became moot when Kapsimalis' Chapter 11 case was converted to a Chapter 7 case post judgment.

stay. *Id.* The ***Peters*** court concluded that when the Chapter 13 plan was confirmed, that Mason could not take advantage and have "the right to immediately foreclose for a pre-petition default." *Id.* at 802. The court concluded, there is a difference between arrearages and default and that due to the language in the ***Peters*** plan, although there were arrearages, there was no "default" because there was no obligation of the debtor to pay for "arrearages" until such time as required under the plan. *Id.* at 803.

The differences between this case and the facts and circumstances involved in ***In re Peters*** are legion. In this case we are, first, dealing with a Chapter 11 Plan; second, have stay relief; third, have an Order and agreement specifying how to cure the pre-petition and post-petition defaults; fourth, have contractual limits on when a trustee's sale can take place; and, fifth, the Bankruptcy Court Order and Plan does not state the obligation is "reinstated" (as in ***In re Peters***), or that it modifies previous Bankruptcy Court Orders or rights secured by stay relief. Confirmation of the Plan cannot be viewed as changing previous Bankruptcy Court Orders, unless the issues are expressly addressed in the Plan. *See*, 11 U.S.C. § 1123(b)(5). As there was stay relief, it was only the contract between the parties which prohibited Great Western from conducting its trustee's sale. The Appeals Court has effectively turned bankruptcy law and the parties' agreement upside down by its holding.

The Plan must be reviewed to determine the agreement of the parties. ***Hillis Motors, Inc.,*** 997 F.2d at 588. In this case, we are dealing with the Debtor's residence and the curing or waiving of any default. Congress has provided special legislation with respect to a debtor's principal residence. *See*, 11 U.S.C. § 1123. Although this section was not in effect for Chapter 11 cases at

the time the Kapsimalis Plan was confirmed, the importance of this issue is demonstrated by Congress's intent to extend these kind of rights from Chapter 13 cases to Chapter 11 cases. As recognized in ***In re Peters,*** the Debtor cannot modify the rights of the holder of a secured claim to the principal residence. *See*, 11 U.S.C. § 1322(b) and 11 U.S.C. § 1123(b)(5). A claim that there was some inadvertent or unintentional modification of these rights flies in the face of not only case law, but the purpose and intent of bankruptcy law itself. The Plan must specifically provide for curing or waiving any default. *See*, 11 U.S.C. § 1123(a)(5)(g). Based upon the stipulated stay relief order, Great Western was free to foreclose, except as specified in the forbearance provisions of the April 26, 1993 Order, which was incorporated into the Plan. The undisputed evidence is therefore, that there has been no modification as to the rights of Great Western to foreclose with the continuing trustee's sale when the Bankruptcy Court ordered lump sum arrearage payment was not made on April 1, 1994.

IV. The Arizona Appellate Court Decision Is Contrary To The Parties' Intent.

Although the parties disagree on whether ten days notice of sale was necessary, the parties themselves have acknowledged that the construction forced upon them by the Appellate Court is contrary to their own interpretation of their own agreement. The Plan of the Debtor should be construed according to the parties' intent. *E.g.*, ***Hillis Motors, Inc.,*** 997 F.2d at 588. Both parties acknowledge that it was not their intent to require the bank to re-notice the trustee's sale. Indeed, Kapsimalis' argument throughout this case has been that she only got seven days notice prior to the trustee's sale and that she was entitled to ten days' notice under the 1992 order (not the subsequent 1993 order or Plan). She has not contended that upon default for failure to cure

under the forbearance agreement that all foreclosure proceedings must be recommenced. The Arizona Appeals Court construction is contrary to the interpretation of the parties who were involved in the contract and must be rejected. Clearly, the Court of Appeals cannot revise, modify, alter, extend or remake a contract to include terms not agreed upon by the parties. ***Isaak v. Massachusetts Indemnity Life Insurance Company,*** 127 Ariz. 581, 623 P.2d 11 (1981). The compromise agreement and its associated orders are the agreement of the parties. It is imperative that the Court, in equity, uphold the compromise agreement. *See,* ***May v. Le Claire,*** 11 Wall. 217. What the Arizona Court of Appeals has done is upset the compromise agreement and place bankruptcy law on its ear.

In May 1992, a stipulation was made between the parties. The stipulation to stay relief allowed Great Western to foreclose or conduct a trustee's sale six months after a disbursement date, if Kapsimalis failed to cure after a ten days notice to cure was sent to the her. In April of 1993, a second stipulated stay relief Order, which superseded the initial Order, was entered into between the parties, which gave Kapsimalis an extension for her ability to cure until April 1, 1994, at which time the forbearance provisions of the agreement would cease and Great Western could foreclose with the continued trustee's sale, as was its unmodified right. If Kapsimalis, in the interim, was unable to make a monthly payment on time, or within fifteen days thereafter, Great Western could foreclose, using the continued trustee's sale **without any notice**. The Plan mandated that all arrearages were to be paid by April 1, 1994. Under bankruptcy law, the rights of Great Western were not modified (except as expressly stated in the Plan). As distinguished from the ***Peters*** case, nowhere in the stipulated Order or Plan is there any mention that the default has been cured or reinstated, which would be necessary in order to reach the conclusion advanced by

the Court of Appeals. The law requires Kapsimalis to have such contents in its Plan; it is not Great Western's obligation to construct Plan language for Kapsimalis. *See*, 11 U.S.C. § 1123(a)(5)(G). Clearly, if there is any uncertainty or ambiguity as a result of the Plan, it should be interpreted against Kapsimalis and not against Great Western. *See, **In re Mako, Inc.,*** 120 B.R. 203 (Bankr. E.D. Okla. 1990); *See generally, **Premier Resources Limited v. Northern Natural Gas Company,*** 616 F.2d 1171 (10th Cir. 1980). It is fundamental that rights are not modified unless so designated by the code, the plan or an order. *See, **Prudence Realization Corp. v. Ferris,*** 323 U.S. 650 (1945). Once a plan is confirmed, the parties have their original rights, only as modified by the terms of the reorganized plan. *See, **Id.***

Clearly, when any contract or plan is sought to be enforced judicially, the Court must attempt to discern and effectuate the parties intentions. *See, **Averett v. Farmers Insurance Company of Arizona,*** 177 Ariz. 531, 869 P.2d 505 (1994), including the Court's intentions. ***In re Doty,*** 129 B.R. at 589. It is fundamental that the Court must ascertain and give effect to the intentions of the parties at the time the contract was made, if at all possible. ***Taylor v. State Farm Mutual Auto Insurance Co.,*** 175 Ariz. 148, 854 P.2d 1134 (1993).[5] The Court's interpretation of the contract in this case is 180° contrary to the evidence with respect to the intent of the parties. Neither Kapsimalis, her state court counsel, or her bankruptcy counsel urged that the "breach or default" had been "cured", or that the continued trustee's sale was not authorized or intended. Indeed, the language of the stipulations and the confirmed Plan and

---

5. As specified in the ***Taylor*** case, the object of contract interpretation is not to satisfy a Judge's compulsive devotion to a jurisprudential theory, but, instead, "to determine and make effective *the intention of the contracting parties*." **3 Corbin on Contracts, Section 572(B), at 421 (1992 Supp.)**, as quoted in ***Taylor,*** 175 Ariz. at 157, 854 P.2d at 1143.

actions of the parties indicate that all parties agreed that Great Western could continue the trustee's sale and there is no indication that such sale would not be effective. Further, when looking at the contract, the Court should consider all the circumstances and can consider the subsequent conduct on understanding the agreements. *See, Id.* In this case, the subsequent actions of Kapsimalis' and her counsel all indicate that the intent of the parties is contrary to the decision found by the Court of Appeals. Nowhere did any of these parties indicate that they believed that under the agreement that a subsequent trustee's sale would be invalid and, in fact, the Plan specifically asserts that it can be conducted without notice upon a failure to cure. Therefore, such construction is clearly erroneous.

The two provisions with respect to the obligations of Kapsimalis are intertwined. Both provisions discussed the arrearages. There is no indication that the term "arrearages", as applied to pre-petition and post-petition defaults, are to be treated differently than the monthly payments or the sums due under the drop dead date of the forbearance agreement. The Plan clearly demonstrates that a trustee's sale could be held for failure to pay the arrearages, or to cure. The construction placed upon the contract by the Court of Appeals is contrary to the expressed intentions of the parties, federal bankruptcy law and is unsupportable, based upon the totality of the circumstances, the reasonable expectations of the parties and the language in the Plan itself. The forbearance agreement only gave Kapsimalis time to cure all defaults by April 1, 1994. In the interim, the trustee's sale would not be conducted if she paid certain sums up until that date. This is not effectively a new breach; it is nothing more than an agreement to forebear conducting the trustee's sale as long as Kapsimalis is in compliance with certain conditions precedent. Kapsimalis did not comply with the conditions precedent and the foreclosure was completed. Kapsimalis

admits that she believed that the foreclosure could and would take place, however her **only** assertion was her unjustified belief, unsupported by the record, that she would have ten days notice prior to such sale. She received, at least, seven days actual notice prior to the sale; she could not cure her default or comply with her agreement. There was a continuing default that was not cured and the agreement clearly contemplated allowing such foreclosure. Summary judgment must be sustained according to the agreement of the parties. The Court of Appeals' interpretation of the agreement is contrary to law and the facts as expressed by all parties.

The documents themselves demonstrate that there was no need for a ten (10) day written notice prior to conducting the foreclosure sale. This is the only argument Kapsimalis had with respect to construction of the bankruptcy Plan. However, her current posture is belied by the Order to Show Cause filed by her bankruptcy attorney. The bankruptcy attorney, the one who negotiated the forbearance agreements, would have better knowledge than Kapsimalis' state court attorney as to what was the intent of the parties. The Bankruptcy Court attorney **did not** argue that ten (10) days written notice was required. Clearly, this is essentially an admission and clear proof that the argument of Kapsimalis in the state court was not the intent of the parties. *See, Cf.,* ***Fox v. Weissbach,*** 76 Ariz. 91, 259 P.2d 258 (1953) (prior pleading can be an admission against interest). While creative lawyering of Kapsimalis' state court counsel cannot be condemned, clearly it is the intent of the parties at the time of the agreement that is at issue herein. The documents themselves demonstrate that there was no need for a ten (10) day notice and Kapsimalis' Bankruptcy Court counsel did not assert such a claim in his motion for an Order to Show Cause. Clearly, **at that time**, the intent is demonstrated that there was no need for a ten

(10) day notice and the entire claim of Kapsimalis is manufactured by counsel in a creative fashion.

V. Kapsimalis Could Not Appeal The Judgment.

When Kapsimalis' Chapter 11 case was converted to a Chapter 7 case on September 22, 1994, the Trustee was appointed. In Chapter 7 cases, the Trustee is the sole party who has the authority to bring or defend suits. 11 U.S.C. § 704. Any causes of action that belong to the Debtor are property of the estate and the responsibility for asserting them whenever necessary is the domain of the trustee. *E.g.*, ***In re Ozark Restaurant Equipment Co.,*** 816 F.2d 122 (8th Cir. 1987); ***Vreugdenhil v. Hoekstra,*** 773 F.2d 213 (8th Cir. 1985) (dismissal of a suit was appropriate, as each claim was properly the bankruptcy estate and not the debtor who had converted from Chapter 11 to Chapter 7). ***In re Leird Church Furniture Manufacturing, Co.,*** 61 B.R. 444; ***Danar Associates v. Porter,*** 43 B.R. 423, 427 (D.Conn. 1984) (the bankruptcy trustee accedes to all of the rights of the debtor and "is vested with the sole and exclusive authority to maintain actions"). As a cause of action is a property right which passes to the Trustee, the Debtor lost any standing to pursue any claims. *See,* ***Carlock v. Pillsbury Co.,*** 719 F.Supp. 791 (D. Minn. 1989); ***Hester v. Farmers Home Administration,*** 49 B.R. 593 (E.D. Mo. 1985) (after debtor's bankruptcy, debtor lacked standing to pursue any claims because those claims become part of the bankruptcy estate). This includes any cases that are pending, but unresolved. ***In re Ozark Restaurant Equipment Co., Inc.,*** 816 F.2d 1222, 1225 (8th Cir. 1987) (any of these actions that are unresolved at the time of filing then pass to the trustees). All of these cases demonstrate that Kapsimalis had no standing to file the appeal from final judgment and, clearly, the Trustee did not timely file an appeal from the summary judgment. Further, the automatic stay clearly

did not bar the appeal by the Kapsimalis estate. 11 U.S.C. § 362 only stays those proceedings that are **against** the debtor and the posture of the case at the initial proceeding is examined. ***McMillan v. MBank, Fort Worth, N.A.,*** 4 F.3d 362 (5th Cir. 1993). Therefore, at a minimum, Kapsimalis' title action was not stayed and it was not timely appealed. The action must be dismissed, despite the ruling of the Arizona Court of Appeals, as Kapsimalis' appeal of October 4, 1994 was not proper or authorized and, therefore, ineffective.

VI. The Question Presented Is Important.

The question presented are federal questions arising under bankruptcy law. Pursuant to the Constitution of the United States, Article I, Section 8, clause 4, bankruptcy law is exclusively in the domain of the federal system United States as determined by Congress. Uniformity of provisions and enforcement is paramount. *See,* ***In re R.I.&P Railroad,*** 72 F.2d 443 (7th Cir. 1934), aff'd; 294 U.S. 648 (1935). To allow the decision of the Arizona Court of Appeals to stand would be an open invitation to allow any state court of appeals to misinterpret the Bankruptcy Code, with impunity, and destroy uniformity.

Further, there is clear indication by the Bankruptcy Court that the Bankruptcy Court retained its jurisdiction as to federal questions and the **only** question that the Bankruptcy Court allowed the state court to decide would be whether the repeated continuations of the trustee's sale constituted "stale" notice, which would not allow the foreclosure to take place. The Arizona Court of Appeals not only ignored the retention of jurisdiction of the Bankruptcy Court, but ignored the doctrine of comity and law of the case, even if there was concurrent jurisdiction. This cannot be allowed to stand, as it would

undermine the purpose and principles of having a Bankruptcy Court decide decisions regarding its own plan.

Kapsimalis and Great Western entered into stipulations in bankruptcy which granted relief from the automatic stay. The Bankruptcy Court entered two Orders, which confirmed that relief had been granted. The Orders were stipulated, based upon negotiations between Kapsimalis and Great Western. Under Federal Bankruptcy Law, the stipulations are binding throughout the case, unless there is a motion which is granted which modifies the agreements. The Plan itself recognizes the agreements between the parties and incorporates a substantial portion of the agreement verbatim. Nowhere in the Plan does it specify that the rights of Great Western have been modified, except as expressly stated in the Plan. Under bankruptcy law, as stay relief had been entered, the only notice requirements were those which were agreed upon between the parties. The Bankruptcy Court knew all the facts Kapsimalis deemed necessary when it issued its denial of the Order to Show Cause hearing. The only question left open by the Bankruptcy Court was whether the trustee's sale notice was "stale" because it had been continued so many times; this was the only question remaining after the denial of the Order to Show Cause. The Arizona Court of Appeals reversed the trial court Judgment, finding that there was a modification of the rights of the parties, based upon the effect of confirmation under 11 U.S.C. § 1141. This ruling not only usurps the power that is granted to the Bankruptcy Court to adjust the rights between the parties, but is an impairment of the contract between the parties. To the Bankruptcy Court's satisfaction, there was no violation of any Federal Bankruptcy Law, or any provision of the Plan. If there was a mistake with respect to the Plan, it was Kapsimalis' obligation to bring that to the Bankruptcy Court. The Arizona Court of Appeals not only usurped this power, that is granted to

and reserved by the Bankruptcy Court, but effectively reversed the Bankruptcy Court's Orders. This cannot be allowed to stand.

Bankruptcy Courts' plans are to be interpreted according to the intent of the parties; this is fundamental bankruptcy law. The Arizona Court of Appeals clearly misapplied bankruptcy law and found holdings that are entirely inconsistent with Federal Bankruptcy Law and Courts of Appeal cases. This must not be allowed to stand.

The Arizona Court of Appeals allowed Kapsimalis to file and pursue an appeal when, in fact, Kapsimalis had no right under Federal Bankruptcy Law. Kapsimalis' case had been converted to a Chapter 7 case and, as such, Kapsimalis lost standing to pursue such claim. There was no timely filing of an appeal by the Trustee.

All of these issues are federal court issues, which the Arizona State Court of Appeals has wrongly decided, based upon federal law; this Order must be vacated.

CONCLUSION

The Supreme Court should grant Certiorari or, alternatively, vacate, summarily, the Court of Appeals' decision.

Roger R. Foote, Esq.
Counsel of Record
1201 South Alma School Road
Suite 12000
Mesa, Arizona 85210-2015
Telephone: (602) 464-1111

Roger R. Foote, Esq.
Eric M. Jackson, Esq.
Roger C. Decker, Esq.
Counsel for Petitioner
1201 South Alma School Road
Suite 12000
Mesa, Arizona 85210-2015
Telephone: (602) 464-1111